

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

Civil Action No. 05-10917 PBS

THE HIPSAVER COMPANY, INC.,)
)
Plaintiff,)
)
v.)
)
J.T. POSEY COMPANY,)
)
Defendant.)
)

DECLARATION OF SHANNON S. SHELDON

I, Shannon S. Sheldon, declare:

1. I am a member of the firm of Sheldon & Mak, admitted to practice law before all of the courts of the State of California, and have been admitted pro hac vice in this matter. I submit this declaration in support of Defendant J.T. Posey Company's ("Posey") Motion to Dismiss The HipSaver Company's ("HipSaver") Complaint Under Fed. R. Civ. P. Rule 12(b)(6), or Alternatively, for Summary Judgment Under Fed. R. Civ. P. Rule 56 ("Posey's Motion").

2. On or about September 22, 2004, a settlement agreement (the "Settlement Agreement") was executed as part of the settlement of a prior action filed by HipSaver against Posey in this Court entitled The HipSaver Company, Inc. v. J.T. Posey Company, U.S.D.C., Case No. 04-11294-PBS. A true and correct copy of the Settlement Agreement is attached hereto as Exhibit A. The agreement is heavily redacted because it contains a confidentiality provision.

3. HipSaver's counsel sent Posey's counsel a demand letter dated May 18, 2005 alleging that Posey disseminated false advertising relating to a study to determine the effectiveness of foam pads (the "Impact Study"). HipSaver attached a copy of Posey's advertisement relating to the Impact Study to the May 18 letter. A true and correct copy of the

May 18 letter is attached hereto as Exhibit B, and the accused advertisement which was attached to the May 18 letter is attached hereto as Exhibit C.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed this 17th day of June, 2005 at Pasadena, California.

/s/ Shannon S. Sheldon

Shannon S. Sheldon

EXHIBIT “A”

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is entered into between The HipSaver Company, Inc. ("HipSaver") and J.T. Posey Company, Inc. ("Posey") with reference to the following facts:

RECITALS

A. HipSaver has filed an action in the United States District Court for the District of Massachusetts entitled *The HipSaver Company, Inc. v. J.T. Posey Company, Inc.*, as Civil Action No. 04-11294 PBS (the "Action"), in which HipSaver accuses Posey among other things of having violated the Lanham Act and the Massachusetts Unfair or Deceptive Business Practices Act by disseminating certain materials, including a document entitled "A Solution to Hip Fractures Using Performance Tested Hip Protectors" (the "White Paper") and including in Posey catalogs and promotional materials certain bar charts comparing the relative effectiveness of hip protectors (the "Bar Charts") and statements derived from the White Paper.

B. Posey denies the allegations asserted by HipSaver in the Action.

C. Posey filed an answer and counterclaim in the Action in which Posey asserts among other things that HipSaver has made false representations about Posey products on HipSaver's website

D. HipSaver denies the allegations asserted by Posey in the Counterclaim.

E. The Parties desire to settle all disputes among them concerning or in any way related to the Action.

NOW, THEREFORE, in consideration of the promises, covenants and conditions set forth in this Agreement, the Parties hereto agree as follows:

REDACTED

REDACTED

8. In the event of any further comparative testing of Posey and HipSaver products by either party, neither party shall make commercial advertising use of the results or analysis related to such testing without first giving the other party at least thirty (30) days advance written notice of the results or analysis.

REDACTED

REDACTED

11. Except for the obligations contained in this Agreement, HipSaver releases Posey, and all of its officers, directors, employees, agents, representatives, dealers, distributors, shareholders, attorneys, predecessors, successors, assigns, affiliates, related companies, or corporations connected with them from any and all claims, liabilities or causes of action, known or unknown, fixed or contingent, which arise from or are related to the false advertising claims under 15 U.S.C. §§ 1125, 1117 and G.L. c.93A, §§ 2, 11 which were asserted or which could have been asserted in the Action for conduct which occurred prior to the date of this Agreement.

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

REDACTED

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the date set forth next to their respective signatures below.

THE HIPSAVER COMPANY, INC.

By: Edward Gooch

J.T. POSEY COMPANY, INC.

By: Ernest M. Posey

Edward L. Goodwin, President
Its: President

Dated: 9/22/04, 2004

Its: President
Dated: 9/21/2004, 2004

APPROVED AS TO FORM:

BROMBERG SUNSTEIN LLP

By: Edward J. Dailey
Edward J. Dailey
Attorneys for HipSaver

Dated: 9. 21. 04, 2004

SHELDON & MAK PC

By: Jeffrey G. Sheldon
Jeffrey G. Sheldon
Attorneys for Posey

Dated: 9/21, 2004

EXHIBIT “B”

EDWARD J. DAILEY
T 617 443 9292 x233
EDAILEY@BROMSUN.COM

May 18, 2005

By pdf and FedEx

Jeffrey G. Sheldon, Esq.
SHELDON & MAK
225 South Lake Avenue
Pasadena, California 91101

Re *The HipSaver Company, Inc. and the J.T. Posey Company*
Our File 02820 / 00502

Dear Jeff:

Thank you for your letters of May 5th and May 9th. I wish to respond to both within the context of the demands made in our letter of May 3, 2005.

First, in having chastised us for sending a copy of the demand letter to Mr. Posey, you seem to have overlooked paragraph 16 in the Settlement Agreement which provides for notice to you and Mr. Posey. Far from having engaged in some ethical lapse, I simply followed the notice terms of our Agreement.

Next, with respect to your “demand” concerning laundry advertising, I must alert you to the fact that the Posey Company challenged this same advertising in its Counterclaim in 2004. *See, for example*, counterclaim paragraphs 55, 56E, and 56G. Inasmuch as the Complaint and Counterclaim were dismissed *with prejudice*, Posey cannot challenge advertising which was subject to its earlier Counterclaim. Consequently, we reject your demand as beyond the subject matter jurisdiction of a court.

Finally, with respect to your response to our demand to withdraw all advertising related to the so-called" independent laboratory study, we must restate that demand and insist on immediate compliance with all remedial steps set out in my letter of May 3, 2005. Otherwise, we will proceed with our litigation in the United States District Court for the District of Massachusetts.

We would like to point out the following:

- a) Contrary to your statement that the objectionable advertising materials "have been used up", the advertising continues to be posted prominently on the Posey Company website. Indeed, the objectionable ads are linked to Hipster models displayed on the website. A copy made from the Posey website at 9:23am this morning is enclosed for your information.
- b) Contrary also to your statement that the objectionable advertising materials "have been used up", incomplete and deceptive Garwood test results continue to be packaged with Posey hip protector product sales to customers.
- c) Contrary also to your statement that the objectionable advertising materials "have been used up", incomplete and Deceptive Garwood test results were distributed at a major safety conference in Florida just last week –after the date of your letter.

We must insist that you comply with the demand set out in our May 3d letter, and we must have your assurance of compliance by noon Pacific Time on Thursday, May 19th. Specifically, the Posey company must immediately cease, desist, and withdraw all advertising on the Posey Company website, in catalogs, in materials sent to customers, in materials distributed to or provided to customers by sales staff and sales representatives, and in materials and demonstrations at industry events which refers or is related in any manner to

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a so-called "independent laboratory study that was conducted to determine the most effective impact absorbing material". This is a formal demand also to cease, desist, and halt distribution of copies or excerpts of certain impact tests conducted by Garwood Laboratories, Inc. and a demand to halt all materials stating, suggesting, or implying that the Garwood Laboratories impact tests constitute an "independent laboratory study ... to determine the most effective impact absorbing material". Finally, this is a formal demand for a corrective advertising statement to be posted on your website and to be made in writing to your sales staff and sales representatives and to every person and entity on your customer and solicitation lists.

Best regards,
Edward J. Dailey
02820/00501 386656.1

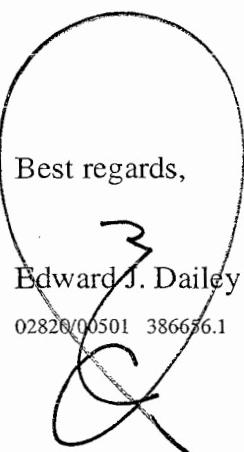
A handwritten signature in black ink, enclosed within a large oval. The signature reads "Edward J. Dailey" with a stylized "3" above the "J". Below the name is the reference number "02820/00501 386656.1". A large, loose handwritten "E" is written below the oval.

EXHIBIT “C”

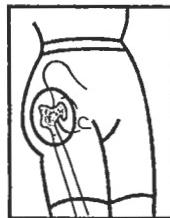


Posey® Hipsters™

Posey Hipsters feature impact absorbing, soft foam pads over the critical fracture area to help minimize potential damage, including hip fractures that can occur from a fall.

Hipsters are available in four styles:

- Standard Unisex Brief easily fits over undergarments, or can be worn as underwear.
- Incontinent Brief features a snap front for easier application over adult diapers.
- Male Fly Brief easily fits over undergarments, or can be worn as underwear.
- EZ-On Brief features a crotchless design that allows patients to wear their own undergarments. The mesh material is water permeable, allowing the EZ On Hipster to be worn during bathing.



All Hipsters are available with original foam padding, or high durability padding designed to withstand laundering in large capacity machines at higher temperature hot washing cycles.

REF 6016 Hipsters, Standard Brief

REF 6017 Hipsters, Incontinent Brief

REF 6018 Hipsters, Male Fly Brief

REF 6019 Hipsters, EZ On

REF 6008 Replacement Pads, 1 pair

REF 6016H Hipsters, High Durability Pads, Standard Brief

REF 6017H Hipsters, High Durability Pads, Incontinent Brief

REF 6018H Hipsters, High Durability Pads, Male Fly Brief

REF 6019H Hipsters, High Durability Pads, EZ On

REF 6008H Replacement High Durability Pads, 1 pair

Application Instructions:

Standard, Male Fly and Incontinent Brief Models

With the Posey label in the back, put the Hipsters on as you would a pair of shorts, sliding them gently over the hips. Adjust to assure that the foam pads are properly aligned with and cover the hip joint.

EZ On Model

1. Unfasten the hook and loop at the waist and thighs.
2. Wrap the garment around your waist. The labels should be at the back and on the inside of the waistband.
3. Fasten the hook and loop at the front of your waist. The waistband should be securely fastened to allow minimal shifting of the garment, but should not feel tight or restrictive.
4. Pull the left panel taut over the left hip and thigh. The pad should be positioned directly over the hip joint.
5. Secure the leg band around the lower thigh using the hook and loop attachment. The elastic band should be tight enough to prevent the pad from sliding out of place without restricting circulation.
6. Repeat steps 4 and 5 on the right side.

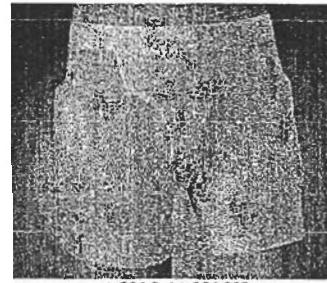
1 Center for Disease Control and Prevention, 27 Aug 2004, www.cdc.gov/ncidod/hip/Sterile/laundry.htm



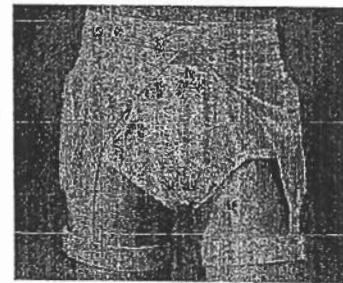
#6016 / #6016H



#6017 / #6017H



#6018 / #6018H



#6019 / #6019H

Laundering Instructions

Posey Hipster with High Durability pads are designed to withstand laundering in higher temperature hot washing cycles. Hipsters can be washed according to CDC guidelines for soiled linen. However, using the lower temperature washing and drying cycle for non-contaminated linen will prolong product life. "Studies have shown that a satisfactory reduction of microbial contamination can be achieved at water temperatures lower than 160°F if laundry chemicals suitable for lower-temperature washing are used at proper concentrations. In the home, normal washing and drying cycles including 'hot' or 'cold' cycles are adequate to ensure patient safety. Manufacturers instructions for the machine and the detergent or wash additive should be followed closely."

- Adhere hook and loop straps before laundering to prevent lint build-up on hook during laundry cycle. If hook and loop does not adhere due to lint, clean hook material with a stiff brush.
- If EZ On pads are removed, wipe clean with mild, liquid disinfectant before replacing in the pants.

Hipsters

120°F
WASH HOT
BLEACH AS DIRECTED
ON CONTAINER

CL
DRY ON MEDIUM

High Durability Hipsters

180°F
WASH HOT 25 MIN.
BLEACH AS DIRECTED
ON CONTAINER

CL
DRY ON HIGH

SIZING CHART		
Size	Waist Measurement	Hip Measurement
S	28" - 30" or 71 - 76cm	35" - 37" or 88 - 93cm
M	30" - 34" or 76 - 86cm	37" - 41" or 93 - 104cm
L	34" - 38" or 86 - 96cm	41" - 45" or 104 - 114cm
XL	38" - 42" or 96 - 106cm	45" - 49" or 114 - 124cm
XXL	42" - 46" or 106 - 116cm	49" - 53" or 124 - 134cm

A WARNING

Due to the random possibility of falls, the Posey Company makes no guarantee, express or implied, that the user is protected from hip trauma. The skin under the pants should be assessed regularly and Hipsters should be changed and washed after each incontinent episode to prevent skin breakdown.

Posey Hipsters contain foam pads that are sealed in a pouch to protect it from water. If the pouch is cut or the seal is broken during laundering, moisture will enter the pouch and may result in waterlogged foam. Waterlogged foam encased in the pouch may promote the growth of bacteria.

- Test the foam and pouch integrity by squeezing the pad in one fist, forcing the air to one end, resulting in an air bubble.
- If you hear or feel liquid or air escaping, the pouch is damaged.
- If the pouch is damaged, discontinue use and discard.

Clinical References Supporting the Use of Hip Protectors

Title: ***External Hip Protectors to Prevent Osteoporotic Hip Fractures***
 Author: A. Ekman, H. Mallmin, K. Michaëlsson, S. Ljunghall
 Publication: *The Lancet*, volume 350, August 23, 1997

Study Objectives: Ekman and colleagues conducted a controlled study on the use of hip protection to prevent hip fractures. One expectation was to either confirm or disprove the 1993 reported findings of J.B. Lauritzen and colleagues in "Effect of external hip protectors on hip fractures."

Results: The use of hip protectors as preventative treatment for hip fractures was validated. "Our study confirms a reduced risk for hip fractures of the same magnitude as the previous report."

Recommendations: "With improved compliance, external hip protectors should be an effective prophylactic against hip fractures."

Title: ***Prevention Of Hip Fracture in Elderly People***
 Author: Pekka Kannus, M.D., Ph.D., et al
 Publication: *The New England Journal of Medicine*, Vol. 343, No. 21, November 21, 2000

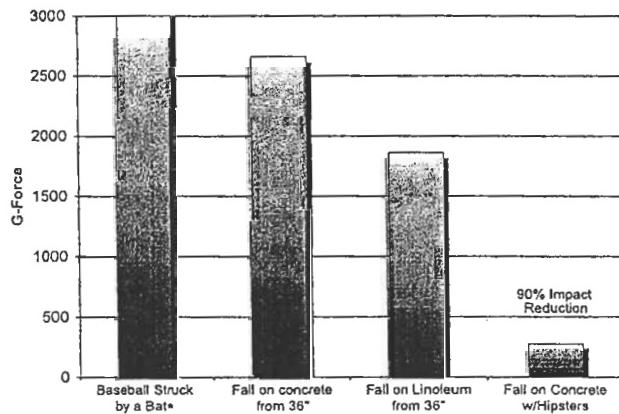
Study Objectives: The purpose of this study was "to determine whether an external hip protector would be effective in preventing hip fractures among elderly adults." The study population was comprised of elderly adults from 22 community based health-care centers in Finland; a treatment group of 653 and a control group of 1,148 participants.

Results: The degree of compliance with the hip protector was $48 \pm 29\%$. The hip protector group suffered 13 hip fractures, 9 of which occurred while not wearing the hip protector, compared to 67 hip fractures in the control group.

Recommendations: "We conclude that the risk of hip fractures can be reduced in frail elderly adults through the use of an anatomically designed external hip protectors. Only 41 persons need to use the hip protector for one year (of 8 persons for five years) in order for one fracture to be prevented."

Posey Hipsters Proven Effective in Laboratory Test

An independent laboratory study was conducted to determine the most effective impact absorbing material. A test was created that would simulate a fall causing direct impact to the greater trochanter. In this study, a weight was released in a guided drop to simulate a 120 lb. subject falling from a height of 36", or the estimated height of the hip above the floor for a typical nursing home resident. The baseline measurement of impact force was determined to be a fall directly onto concrete. The G-Force of a fall under this scenario was 2,660G's and, for purposes of comparison, is just slightly less impact force than that of a baseball being struck by a bat. In this extreme test, the low profile Posey Hipster reduced the impact force on average by 90% and showed excellent impact energy absorption.



Testing was conducted by Garwood Laboratories.
 Data on file at J.T. Posey Company *Source: www.madsci.org